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Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States
October Term, 1997

DAVID M. DUCHOW

Petitioner

versus

THE UNITED STATES OF AMERICA, RICHARD BACA AND JANICE ELMORE

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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HIPP

QUESTIONS PRESENTED

Whether the United States Constitution protects United States citizens employed abroad in the foreign service of the United States from violations by United States government officials?

If so, is a writ of mandamus or injunction available to remedy that citizen's warrantless arrest, interrogation without benefit of counsel, false accusation of a crime, waiver of diplomatic immunity, employment of Bolivian lawyers and use of undue influence by those United States officials attempting to have the citizen convicted of crime and incarcerated in a foreign prison of horrific conditions, all in violation of the Fourth, Fifth, Sixth and Eighth Amendments and his right to trial by a Court established under Article III of the United States Constitution?

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc filed on June 6, 1997 in *David M. Duchow v. United States of America, Richard Baca and Janice Elmore*, No. 96-30306, unreported and re-printed at Appendix A to this petition, p. App.1.

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit filed on April 7, 1997 in *David M. Duchow v. United States of America, Richard Baca and Janice Elmore*, No. 96-30306, is unpublished but reported at 114 F.3d 1181 and reprinted at Appendix B to this petition, p. App. 3.

The opinion of the United States District Court for the Eastern District of Louisiana on Petitioner's Motion for New Trial and Motion for Review of Magistrate's Order Denying Leave to File Amended Complaint in *David M. Duchow v. United States of America, Richard Baca and Janice Elmore*, Civil Action No. 95-2121, January 31, 1996, is reported at 1996 WL 39435 (E.D. La.) and reprinted at Appendix C to this petition, p. App. 5.

The opinion of the United States District Court for the Eastern District of Louisiana on the Government's Motion to Dismiss in *David M. Duchow v. United States of America, Richard Baca and Janice Elmore*, Civil Action No. 95-2121, July 19, 1995, is reported at 1996 WL 39435 (E.D. La.) and reprinted at Appendix D to this petition, p. App.11.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed herein was entered on April 7, 1997 (Appendix B, p. App. 3). Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the United States Court of Appeals for the Fifth Circuit on June 6, 1997. (Appendix A, p. App. 1)

The jurisdiction of the Honorable Court is invoked under 28 U.S.C.1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Article III
Section 2, Clause 3. Criminal Trial by Jury

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution, Amendment IV. Search and Seizure

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use,

without just compensation.

United States Constitution, Amendment VI. Jury trials for crimes, and procedural rights

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment VIII. Excessive Bail, Fines, Punishments

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. 1331 Federal Question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. 1361 Action to compel an officer of the United States to perform his duty

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

22 C.F.R. 71.1 Protection of Americans abroad.

> Officers of the Foreign Service shall perform such duties in connection with the protection of American nationals abroad as may be imposed upon them by rules and regulations prescribed by the Secretary of State.

22 C.F.R. 71.6 Services for distressed Americans.

> Officers of the Foreign Service shall extend every possible aid and assistance within their power to distressed American citizens within their districts, but they shall not expend the funds nor pledge the credit of the Government of the United States for this purpose, except in the case of American seamen, or except as authorized by the Department of State.

22 C.F.R. 71.10

Please see Appendix, p. App 21

STATEMENT OF THE CASE

David M. Duchow is a Captain in the United States Army who was recruited by the United States of America and accepted assignment to the Department of State as a Field Adviser of the Narcotics Affairs Section of the American Embassy ("NAS") in Bolivia. As a Field Adviser, Duchow has responsibility for United States narcotics interdiction efforts in "the war on drugs" in the Beni and Pando provinces of Bolivia, effectively the "point man" for the United States in this jungle, as he had been in the jungles of Vietnam during that war.

Janice Elmore, Assistant Director of the NAS and Duchow's immediate supervisor, in the company of a United States

Coast Guard contingent and the Bolivian Narcotics Police Force, arrested Duchow without a warrant and took him to a Bolivian Naval Base where he was interrogated by United States and Bolivian officials for several days. Initially, the questioning lead Duchow to believe that he was suspected of involvement in drug trafficking. When Duchow invoked his right to counsel, the United States officials involved in the interrogation informed him that they intended to waive his diplomatic immunity and prosecute him in Bolivia.

Ms. Elmore subsequently filed a complaint, in her official capacity as a diplomatic official of the American Embassy, with the Bolivian government accusing Duchow of misappropriating fuel with which he had been entrusted by the United States as part of his employment. He was transferred to a Bolivian jail and released by Bolivian officials shortly thereafter.

Upon Duchow's release, Richard Baca, Director of the NAS, traveled to Duchow's town of station, Trinidad, Bolivia, hired a Bolivian lawyer, met with and influenced witnesses, the Bolivian prosecutor and judge and had caused Duchow to be re-arrested. Duchow was kept in the local jail for over a month under a threat that he would be sent to the Mocovi Prison, a third world penitentiary of the harshest conditions containing 85% drug dealers who hate American anti-narcotics officers and who would kill Duchow, even if able to survive the harsh conditions of the prison with his Vietnam War disability.[1]

Duchow remains under prosecution for the charges filed by

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[1]Inmates in Mocovi Prison occupy tiny cells with no ventilation, lighting or beds. The prison is overcrowded with inmates. Food is contaminated and disease is rampant. Duchow had his spleen removed because of a Vietnam War injury and has a significantly weakened immune system. However, the worst risk is from the coca manufacturers incarcerated therein who hate and would kill any American anti-narcotics officers put into the jail.

the United States of America against him in Bolivia. He cannot leave the country as to do so would violate the terms of his bonded release pending trial and subject him to certain bail revocation and imprisonment. If convicted of the charges against him, he will be sent to Mocovi Prison. The United States has also recently filed motions seeking to have his bond revoked so that he will be sent to Mocovi Prison pending trial.

The Proceedings Below

Captain Duchow filed suit in the Eastern District of Louisiana seeking to have the United States officials responsible for Duchow's incarceration ordered to withdraw their complaints, dismiss the lawyer hired by them, confirm his diplomatic immunity and prosecute him in the United States. Jurisdiction over Duchow's claims in the District Court were based in pertinent part on 28 U.S.C. 1331 and 28 U.S.C. 1361. The district court ruled that Duchow failed to state a claim for mandamus relief because his supervisors in the American embassy owed him no clear and ministerial duty to refrain from acting within the justice system of a foreign government to prosecute a United States citizen, even when that prosecution would deprive the citizen of his Article III, Fourth, Fifth, Sixth and Eighth Amendment constitutional rights.

The district court ruled that Duchow failed to state a claim for injunctive relief, citing the Act of State Doctrine as a bar to substantial likelihood of success on the merits. The Act of State Doctrine has nothing to do with actions of United States officials supervising, controlling, and ultimately doing harm to their United States citizen employees. This action in Mandamus does not question the authority of the Bolivian government to do whatever they deem appropriate, but it challenges the actions of Duchow's supervisors and superiors in the United States government, who pressured the Bolivian government to arrest, prosecute, and to imprison Duchow in circumstances that will likely cause his death if

allowed.[2]

Appeal was taken to the Fifth Circuit and the Fifth Circuit upheld the district court on the mandamus issue because he failed to state a duty. On the injunction issue, the Fifth Circuit did not reach the applicability of the Act of State doctrine but held that Duchow could not prevail on the claim because Duchow "failed to show a substantial likelihood of success on the merits and that both the balance of the hardships and the public interest weigh against his claims." No further explanation or reasons were given. Duchow's Petition for Rehearing was denied.

The United States District Court and Fifth Circuit Court of Appeals have ruled in this case that a citizen fails to state a claim upon which injunctive or mandamus relief may be granted when he alleges that his supervisors in the Department of State have violated his statutory and constitutional rights by:

(1) participating with foreign police officials in his arrest and interrogation;
(2) filing accusations of a crime against him with a foreign government;
(3) waiving a vested grant of diplomatic immunity; and
(4) hiring and paying a foreign lawyer to appear and represent the United States, in an adversarial criminal prosecution for the crime of which he is accused by his supervisors,

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[2]See, e.g. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400, 100 S.Ct. 701, 107 L.Ed.2d 816 (1990); Covey T. Oliver, Edwin B. Finnage, Christopher L. Blakelsey, Richard F. Scott, & Sharon A. Williams, The International Legal System: *Cases & Materials Ch. 8, On the Act of State Doctrine* (Foundation Press, 4th ed. 1995).

all toward the goal of having him incarcerated in a barbaric, third world jail of horrific conditions populated with drug dealers who will kill him.

ARGUMENT

I. United States Constitution Protects Duchow.

The lower court opinions violate established Supreme Court precedent to the effect that the constitution applies to protect U.S. citizens abroad vis a vis U. S. officers acting in their official capacity. Reid v. Covert, 354 U.S. 1, 5, 6 (1957); United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S.Ct. 1839, 108 L.Ed. 2d 222 (1990). Further, they erode an important area of federal court jurisdiction to review the constitutionality of executive branch actions. Jones v. Clinton, ___ U.S.___ , 117 S.Ct. 1636, (1997). Finally, the rule of the lower courts in the instant case crucially affects the decision of every foreign service employee to engage in overseas assignments.

The issue of jurisdiction in United States courts should be simple. In addition to the fact that Duchow is a U.S. citizen and a government employee, the fact that the U.S. has physically participated in his arrest, filed complaints of crime against him and hired an agent (attorney to represent the U.S. against Duchow) establishes prescriptive and adjudicatory jurisdiction over his superior's actions. A U.S. court certainly has authority to hear the evidence and to enjoin action taken by U.S. officials and agents. Also, jurisdiction obtains on the basis of the nationality principle. Rose v. Himley, 8 U.S. 143, 166 (4 Cranch) 240, 279 (1808) (dictum); see also, Chief Justice John Marshall's speech, Livingston's Resolution, U.S. House of Representatives, quoted in Appendix, 18 U.S. (5 Wheat.) 129, n. 1 (1829).

The United States government has a duty under the Constitution to refrain from using its power to cause another government to injure United States citizens and employees abroad.

Not to take this supervisory power seriously will put the most vulnerable U.S. employees at risk and will ultimately eviscerate the ability of the United States to accomplish its most sensitive tasks abroad. Nevertheless, a U.S. district court refused to exercise jurisdiction and this decision has been upheld by the Fifth Circuit. This is wrong. Obviously, the United States courts may not order another sovereign nation to do anything; but this does not mean that it has no authority to order United States officials to do their duty of diplomatic protection and to refrain from harming its citizens and employees.

In Reid v. Covert, 354 U.S. 1, 5, 6 (1957), the Court stated,

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. *When the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.* This is not a novel concept. To the contrary, it is as old as government.

This proposition of international constitutional protection was eloquently and importantly stated by this Court. It is more important now than in 1957 with the advancement of the United States as a world power and the extension of United States influence into the internal affairs of more foreign countries. Increased communications and travel capacities have made the world a much smaller place. Because the United States acts as a global military and police force, many of its citizens are employed abroad. These citizens undoubtedly should be protected from official government action of their supervisors in the United States

government which would violate the Constitution if taken in the States.

No case cited by the government or relied on by the courts below limits the holding of Reid v. Covert. It provides Captain Duchow with the relief he requests and the cited principle of the case should be re-affirmed at this time. The district court decision together with the Fifth Circuit affirmation places Reid v. Covert in jeopardy.

United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S.Ct. 1839, 108 L.Ed. 2d 222 (1990) held that a foreign alien is not entitled to the protection of the Fourth Amendment because an alien is not a person for constitutional purposes. Some commentators have argued that this decision forebodes a lessening in the Court's commitment to protection of the civil rights of United States citizens abroad. However, the Verdugo-Urquidez Court did not state that it restricted the application of the Constitution to United States citizens abroad. The instant case is the perfect opposite of Verdugo-Urquidez. As such, it presents the Court an opportunity to clarify the fact that the Constitution does still apply to United States citizens abroad.

Article III, Fourth, Fifth, Sixth and Eighth Amendment violations were all plead by Duchow in the lower courts.

II. United States Statutes Evidence The Existence Of A Duty.

While statutes do not define the limits of constitutional protection, it is noteworthy that the Code of Federal Regulations provide United States citizens abroad with protection from the type of official government action which threatens Duchow in this case. 22 C.F.R. § 71.1 provides, "officers of the foreign service shall perform such duties in connection with protection of American nationals abroad as may be imposed upon them by the Secretary of State." 22 C.F.R. § 71.6 provides, "officers of the foreign service

shall extend every possible aid and assistance within their power to distressed American citizens within their districts...." It is the duty of United States officials to protect American citizens when they are abroad; therefore, a fortiori, it is their duty not to do them affirmative harm by taking action in conjunction with a foreign sovereign to arrest and imprison them, risking serious injury or death.

> "As soon as the consular officer is aware that a U.S. national prisoner in the consular faces a medical crisis, the officer should take the following actions, setting forth the order of priority, based on an evaluation of the facts received: (1) Make every effort to contact the ill or injured prisoner as soon as possible; (2) take steps to obtain a professional medical diagnosis and prognosis of the ill or injured prisoner; . . . When a medical emergency prohibits the delay inherent in contacting the Department and receiving authority to expend funds, the Consular official can spend up to an amount to be established by the Department without prior Department approval; if . . . (3) Immediate treatment is warranted in order to verify the alleged abuse of a U.S. national by arresting or confining authorities. 22 C.F.R. 71.10

Duchow lost his spleen in the Vietnam War, causing him a weakened immune system. The United States knows this fact and is outrageous in its actions to have him incarcerated in Mocovi Prison. To have Duchow imprisoned where he was instrumental in having many persons incarcerated and where he will be targeted for assassination as a United States narcotics interdiction agent, makes the official U.S. action to prosecute him in Bolivia unconscionable.

The lower court's decisions in this case present a threat to the court's jurisdiction to hear cases involving review of Executive Branch official action. Recently, in Jones v. Clinton, ___ U.S.___, 117 S.Ct. 1636, (1997) this Court has stated,

> it is settled that the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, see e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153, and may direct appropriate process to the President himself, see e.g., United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039. 117 S.Ct. 1636, 1638

This commitment of the Court to review official action of the Executive will be weakened by allowing the decisions of the lower courts in this case to stand uncorrected.

It is inappropriate and illegal to utilize foreign governments as agents to do to United States citizens what would either not be possible in the United States or what would implicate constitutional protections not available in the foreign country. This Court has a duty not to allow this abuse of power to occur. To fail to exercise its mandate can only serve as precedent for future abuse and a general erosion of federal court jurisdiction.

Finally, the lower courts have established a precedent in this case that allows a supervising United States official in the various embassies of the United States of America around the world to manipulate the criminal process of a foreign country to the detriment and harm of her subordinate employees. The incentives created by such a rule are not sound policy. No citizen in his right mind would serve the foreign service abroad if they knew that they waived their Constitutional rights in doing so. Also, those employees serving abroad who become aware of some kind of wrongdoing by their supervisors will not be willing to make this information known as the supervisor could hold, as in the case of Duchow, the power of life and death over him.[3]

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[3]See generally; Christopher L. Blakesley, *Challenges to Achieving an International Concensus: Differing Notions of Crime, Individual Autonomy, in War on Drugs*, in Colloquium on

CONCLUSION

The Fifth Circuit has fundamentally mistaken their role in refusing to review the actions of the Executive Branch of government. Instead of dismissing the case of Captain Duchow, it should have exercised its jurisdiction and ruled the United States officials responsible for his arrest, incarceration and prosecution into Court for a reviewing of their involvement in and use of the judicial process of a foreign country to deprive a United States citizen of his constitutional and statutory rights.

This Honorable Court should grant the writ petitioned for herein and take this case on review so as to correct the erroneous decision of the appellate court and settle the important federal question of the extent to which the United States Constitution applies to protect United States citizens employed in the foreign service abroad from violations by United States government officials.

Respectfully Submitted,

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the *International Criminal Law & The Protection of Human Rights*, New York University School of Law (April 14, 1997) (paper presented) (expanded article, at press for symposium Issue, 29 N.Y.U. Journal of International Law & Politics _____ (1997); see, Christopher L. Blakesley, *Terrorism, Drugs, International Law & The Protection of Human Liberty* p. 129-131, and nn. 126-138 (Transnational 1992).

APPENDIX A
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-30306

(Filed June 6, 1997)

David M. Duchow
Plaintiff-Appellant

versus

United States of America, Richard Baca and Janice Elmore
Defendant-Appellees

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before Emilio M. Garza, Parker and Dennis, Circuit Judges

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of judges in active service not having voted in favor, Rehearing En Banc is denied.

ENTERED FOR THE COURT:
S/ Emilio M. Garza
United States Circuit Judge

APPENDIX B
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-30306

(Filed April 7, 1997)

David M. Duchow
Plaintiff-Appellant
versus
United States of America, Richard Baca and Janice Elmore
Defendant-Appellees

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

Before EMILIO M. GARZA, PARKER and DENNIS, Circuit Judges.

PER CURIAM: *

David Duchow appeals the dismissal of his various claims against the United States and officials of the U.S. embassy in Bolivia. After carefully reviewing the record, we find no error, and affirm.

The District Court dismissed Duchow's petition for a writ of mandamus because Duchow failed to show any clear, ministerial duty owed him by the United States government. The court also dismissed Duchow's petition for a writ of habeas corpus because Duchow was not in the custody of the United States government nor of any state. Duchow's mandamus and habeas claims are without merit, and for the reasons articulated by the district court, we affirm their dismissal.

Duchow sued for injunctive relief, but failed to meet the four criteria required to justify such relief. We have held that, in order to merit injunctive relief, the petitioner must show irreparable injury, substantial likelihood of success on the merits, favorable balance of hardships, and no adverse effect on the public interest. *Black Firefighters Association versus Dallas*, 905 F.2d 63, 65 (5th Cir. 1990). The district court dismissed Duchow's plea for injunctive relief based on the Act of State Doctrine and because it held that the United States had not waived its sovereign immunity from suit. We do not reach those issues here, however. After a reviewing the record, we find that Duchow has failed to show a substantial likelihood of success on the merits and that both the balance of hardships and the public interest weigh against his claims.

AFFIRMED.

* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX C

David M. DUCHOW

v.

UNITED STATES of America, Richard Baca, Janice Elmore.

No. Civ. A. 95-2121.

United States District Court, E.D. Louisiana.

Jan. 31, 1996.

ORDER AND REASONS

FALLON, District Judge.

Before the Court are two motions: 1) Plaintiff's Motion for New Trial based on evidence that the United States has hired a special Bolivian prosecutor; and 2) Plaintiff's Motion for Review of Magistrate Judge Chasez's order denying plaintiff's motion for leave to file amended complaint, also based on evidence that the United States has hired a special Bolivian prosecutor. For the reasons that follow, both motions are DENIED.

BACKGROUND: Plaintiff David Duchow is a citizen of the United States, domiciliary of Lafourche Parish, Louisiana, and a contract employee of the Narcotics Affairs Section ("NAS"), American Embassy, La Paz, Bolivia. On June 30, 1995, he brought this action seeking habeas, mandamus, and injunctive relief as well as damages against the United States and against individuals Richard Baca and Janice Elmore, both individually and in their official capacities as director and assistant director, respectively, of the NAS. Plaintiff alleged tort, contract, statutory, and constitutional violations.

Plaintiff's claims arise from his arrest on May 3, 1995 by the Bolivian Narcotics Police, which led to his being charged with misappropriation of fuel. Although the prosecution has been conducted by Bolivian officials, plaintiff alleged that it was initiated based upon a false complaint filed by defendant Elmore with the Bolivian government. Plaintiff further asserted that the Bolivian government would not have maintained the prosecution but for

exertion of political pressure from defendants Baca and Elmore.

On the afternoon of June 30, 1995, simultaneously with the filing of his complaint, plaintiff moved this Court for a Temporary Restraining Order. That same afternoon, after a telephone conference in which the U.S. Attorney's Office and counsel for plaintiff participated, this Court denied the TRO and scheduled the hearing on plaintiff's motion for preliminary injunction for July 13. Plaintiff subsequently filed various motions for discovery to which the Government responded with a motion for protective order as well as a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim and, alternatively, for summary judgment. On July 10, this Court granted an expedited hearing on the motion to dismiss and, by order of Magistrate Judge

Lance M. Africk, stayed discovery pending this Court's ruling on the motion to dismiss. At the hearing held July 12, 1995, plaintiff moved to voluntarily dismiss his claims against defendants Baca and Elmore in their individual capacities, which motion was granted by this Court.

On July 19, 1995, this Court granted the Government's motion to dismiss. This Court reasoned that plaintiff had failed to state a claim for mandamus relief because he had alleged no clear, ministerial duty, statutory or otherwise, 1) prohibiting employees of the United States from bringing charges against a United States citizen that could prompt a foreign investigation and/or prosecution for a crime, the punishment for which could entail deprivation of life or liberty without "due process" as we have defined it in this country, or 2) requiring such employees to extricate United States citizens from all such foreign proceedings, regardless of the crime charged. Plaintiff's prayer for a Writ of Habeas Corpus was dismissed because it was clear from the face of the complaint that Bolivia, not the United States, possessed custody of plaintiff. Plaintiff's claim for injunctive relief was dismissed because plaintiff could not establish a likelihood of success on the merits in light of the Act of State doctrine, which precluded this Court from

interfering with the acts of the Bolivian government within its own borders. With regard to plaintiff's claims for damages for tort and breach of contract, this Court dismissed those claims without prejudice on jurisdictional grounds. The Court of Federal Claims possesses exclusive jurisdiction (pursuant to the Contract Disputes Act of 1978) over plaintiff's contract claim, and, with respect to the tort claim, plaintiff had failed to comply with the notice requirements of the Federal Tort Claims Act, thus depriving this Court of jurisdiction. As for plaintiff's claim for damages based on alleged constitutional violations, this Court dismissed the claim because the United States has not waived its sovereign immunity with respect to suits for such damages.

After this Court issued it's order granting the Government's motion to dismiss, plaintiff filed a motion for leave to file a supplemental complaint, alleging that the United States had hired one Dr. Jose Morales, a Bolivian attorney, to act as a special prosecutor with regard to the charges against plaintiff. The supplemental complaint sought an injunction or writ of mandamus ordering that the United States cease paying Dr. Morales. Based on this Court's earlier ruling, Magistrate Judge Alma L. Chasez denied the motion. Now, in addition to seeking review of Magistrate Judge Chasez's ruling, plaintiff asks this Court to vacate its prior order to the extent that it dismissed plaintiff's claims for injunctive or mandamus relief. Thus, plaintiff seeks to file the supplemental complaint and to be granted a new trial on his claims for mandamus and injunctive relief prohibiting the payment of Dr. Morales.

The defendants initially opposed plaintiff's motions on procedural grounds, arguing that plaintiff had known prior to this Court's dismissal of plaintiff's claims that Dr. Morales had been retained and had, in fact, mentioned this detail in his opposition to the defendants' motion to dismiss. At oral argument, on October 18, 1995, this Court indicated that it would not deny plaintiff's motions solely on procedural grounds and ordered the defendants to submit a supplemental memorandum addressing the merits of plaintiff's argument that the hiring of Dr. Morales provides grounds for

mandamus and/or injunctive relief, thus warranting a new trial on those claims. Defendants have now submitted this memorandum, and plaintiff has filed a reply.

ANALYSIS: The essence of plaintiff's argument for new trial is that the United States government's retention of Dr. Jose Morales to represent the United States in the criminal proceeding against plaintiff demonstrates that the United States, not Bolivia, is the moving force behind the prosecution. In other words, plaintiff argues that the hiring of Dr. Morales shows that the proceeding is in fact a United States prosecution, with the country of Bolivia acting merely as host of the proceedings. Thus, plaintiff maintains that the Act of State doctrine, which precludes this Court from interfering with a Bolivian prosecution, is no longer implicated. Because the United States, according to plaintiff, is reaching out its arm to prosecute plaintiff, the prosecution is restricted by the Bill of Rights.

In opposition, defendants submit the affidavit of Dr. Morales, who is licensed to practice law in Bolivia and has been retained by the United States to represent its interests in the proceedings against plaintiff in Bolivia. In his affidavit, Dr. Morales explains that victims often must retain counsel to act on their behalf in a Bolivian criminal proceeding because under Article 16 of Bolivia's Civil Code, where civil damages arise out of an act that also constitutes a criminal violation, the civil action for restitution is tried in the same proceedings as the penal action. According to his affidavit, Dr. Morales has been retained by the United States Department of Justice to act in this capacity on behalf of the United States in its role as victim and civil complainant. Pursuant to this role, Dr. Morales has appeared at various court proceedings and has acted as liaison between the Bolivian public prosecutor's office and the United States. Based on this affidavit, the defendants argue that the hiring of Dr. Morales in no way transforms the criminal proceedings against plaintiff into a prosecution by the United States. The United States, as the victim of a crime, is simply cooperating with the Bolivian prosecutor's

office and availing itself of Bolivia's laws in seeking restitution.

Plaintiff argues that a new trial is warranted because the retention of Dr. Morales represents a clear violation of the Due Process clause and the Eighth Amendment, which protections extend to United States citizens when the United States seeks to prosecute them abroad. See Reid v. Covert, 354 U.S. 1, 5-6 (1957). However, the Constitution cannot shield a United States citizen when a foreign government seeks to prosecute him for an alleged crime committed within its borders. See Neely v. Henkel, 180 U.S. 109, 123 (1901) ("When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States."). [FN1] Nor can plaintiff point to any part of the Constitution that would prohibit the United States government, as the victim of an alleged crime committed by a United States citizen on foreign soil, from acting to defend its economic interests or cooperating with the foreign government that is prosecuting the crime.

On the basis of plaintiff's original complaint, this Court held that plaintiff had failed to set forth a clearly prescribed duty that could form the basis of mandamus relief and that the Act of State doctrine barred the issuance of any injunctive relief that would interfere with the Bolivian prosecution of plaintiff. After considering the arguments and evidence presented by both sides, this Court is unpersuaded that the United States' retention of Dr. Morales does anything to alter this analysis.

As for plaintiff's request that he be permitted to take the depositions of Richard Baca, Janice Elmore, and Dr. Morales, the Court finds that any such interference in the proceedings in Bolivia is unjustified.

For the foregoing reasons, IT IS HEREBY ORDERED that

the plaintiff's motion for new trial and motion for review of magistrate's ruling are HEREBY DENIED.

FN1. Although it is irrelevant to the Court's analysis, it is worth noting that under the constitution of Bolivia, plaintiff has the right to assistance of counsel, the right to confront witnesses, the privilege against self incrimination, and a presumption of innocence. See Morales affidavit at p. 9.

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APPENDIX D
David M. DUCHOW
v.
UNITED STATES of America, Richard Baca, Janice Elmore.
Civ. A. No. 95-2121.
United States District Court, E.D. Louisiana.
July 19, 1995.

Order and Reasons Granting Government's Motion to Dismiss and Alternatively, for Summary Judgment

FALLON, District Judge.

Before the Court is the Government's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim and, alternatively, for summary judgment. For the reasons that follow, the motion to dismiss is GRANTED.

BACKGROUND: Plaintiff David Duchow is a citizen of the United States, domiciliary of Lafourche Parish, Louisiana, and a contract employee of the Narcotics Affairs Section ("NAS"), American Embassy, La Paz, Bolivia since 1991. He brings this action seeking habeas, mandamus, and injunctive relief as well as damages against the United States and against individuals Richard Baca and Janice Elmore, both individually and in their official capacities as director and assistant director, respectively, of the NAS. Plaintiff alleges tort, contract, statutory, and constitutional violations.

Plaintiff's claims arise from his arrest on May 3, 1995 by the Bolivian Narcotics Police, which led to his being charged with misappropriation of fuel. Bolivian officials allegedly detained him in a private holding cell for 13 or 14 days before releasing him. He was then rearrested on June 1, 1995, and again detained in a holding cell until June 23, on which date a Bolivian judge released him on a writ of habeas corpus. Plaintiff alleges that his detention is to resume on July 17, 1995, at which time he believes that he will be

placed in the general prison population where he will suffer great bodily harm and even loss of life. Although this prosecution and on going investigation is being conducted by Bolivian officials, plaintiff maintains that it was initiated based upon a false complaint filed by defendant Elmore with the Bolivian government. Plaintiff further asserts that the Bolivian government would not have maintained this prosecution but for exertion of political pressure from defendants Baca and Elmore.

On the afternoon of June 30, 1995, simultaneously with the filing of his complaint, plaintiff moved this Court for a Temporary Restraining Order. That same afternoon, after a telephone conference in which the U.S. Attorney's Office and counsel for plaintiff participated, this Court denied the TRO and scheduled the hearing on plaintiff's motion for preliminary injunction for July 13. [FN1] Plaintiff subsequently filed various motions for discovery to which the Government responded with a motion for protective order as well as a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim and, alternatively, for summary judgment. On July 10, this Court granted an expedited hearing on the motion to dismiss and, by order of Magistrate Judge Africk, stayed discovery pending this Court's ruling on the motion to dismiss. It is this motion that is before the Court.

At the hearing on this motion, held July 12, 1995, plaintiff moved to voluntarily dismiss his claims against defendants Baca and Elmore in their individual capacities, which motion was granted by this Court. Thus, the Government's motion is moot with respect to these claims and we need only address the remaining claims against the United States and defendants Baca and Elmore in their official capacities.

ANALYSIS: In considering a motion to dismiss for failure to state a claim, we must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. Miller v. Medical Ctr. of Southwest Louisiana, 22 F.3d 626, 628 (5th

Cir.1994). The motion should be granted "only if the plaintiff can prove no set of facts that would entitle him to the relief for which he prays." McCartney v. First City Bank, 970 F.2d 45, 47 (5th Cir.1992). Applying this standard, we find that plaintiff has stated no claim against the United States or the individual defendants in their official capacities upon which relief may be granted.

I. MANDAMUS: Plaintiff petitions this Court for a Writ of Mandamus ordering defendants Baca and Elmore to withdraw their complaints against plaintiff and to request his immediate release from Bolivian custody. The Mandamus Act grants federal district courts jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. S 1361. "For mandamus jurisdiction to exist, ...' plaintiff must show a clear right to the relief sought, a clear duty by the defendant to do the particular act, and that no other adequate remedy is available.' " United States v. O'Neil, 767 F.2d 1111, 1112 (5th Cir.1985) (quoting Green v. Heckler, 742 F.2d 237, 241 (5th Cir.1984)). According to the Fifth Circuit, "[m]andamus is an appropriate remedy 'only when the plaintiff's "claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." ' " Giddings v. Chandler, 979 F.2d 1104, 1108 (5th Cir.1992) (quoting Nova Stylings, Inc. v. Ladd, 695 F.2d 1179 (9th Cir.1983) (quoting Jarrett v. Resor, 426 F.2d 213, 216 (9th Cir.1970) and Tagupa v. East-West Center., Inc., 642 F.2d 1127, 1129 (9th Cir.1981))). Mandamus is therefore "not available to review the discretionary acts of officials." Giddings, 979 F.2d at 1108.

We find that plaintiff fails to state any duty on the part of the defendants that is sufficiently clear and ministerial as to warrant a Writ of Mandamus. [FN2] First, plaintiff points to the Constitution's prohibition of deprivation of life without due process, arguing that allowing Baca and Elmore to bring charges against the plaintiff under the laws of Bolivia will result in his incarceration and death. For the Constitution to support a Writ of Mandamus in

this case, we must infer from it a clear, ministerial duty 1) prohibiting employees of the United States from bringing charges against any United States citizen that could prompt a foreign investigation and/or prosecution for a crime, the punishment for which could entail deprivation of life or liberty without "due process" as we have defined it in this country, and 2) requiring such employees to extricate United States citizens from all such foreign proceedings, regardless of the crime charged and regardless of the foreign sovereign involved. We find no such clearly prescribed duty. [FN3]

Secondly, plaintiff points to 22 U.S.C. S 1732, which provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

We find that the duty set forth by this provision is far from ministerial. On the contrary, it calls for a careful exercise of diplomatic discretion on the part of the Executive. See Redpath v. Kissinger, 415 F.Supp. 566 (W.D.Tex.), aff'd, 545 F.2d 167 (5th Cir.1976). [FN4] Thus, the statute cannot support a Writ of Mandamus.

Lastly, plaintiff points to 22 C.F.R. S 71:6, which requires

Foreign Service officers to extend every possible aid to distressed United States citizens within their districts. Again, we cannot infer from this regulation a clear ministerial duty prohibiting Foreign Service officers from initiating or participating in a foreign criminal investigation of a United States citizen or requiring such officers to request release of such citizens from the custody of a foreign sovereign.

Because plaintiff fails to allege a clear duty on the part of defendants Baca and Elmore, we find that plaintiff's petition for Writ of Mandamus fails to state a claim for which relief can be granted.

II. Habeas Corpus: Plaintiff seeks a Writ of Habeas Corpus ordering defendants to deliver plaintiff's person to this Court for the purpose of determining the lawfulness of his incarceration. Plaintiff properly does not seek a Writ of Habeas directed to the Bolivian government. Such an order would require this Court to judge the validity of Bolivia's acts within its boundaries and would be inappropriate. See Callejo v. Bancomer, S.A., 764 F.2d 1101, 1105 (5th Cir.1985). Yet, it is the Bolivian government who has custody over plaintiff and who would be required to produce the body. Plaintiff attempts to circumvent this fact by alleging that because the defendants initiated the complaint and have pressured the Bolivian government to maintain the prosecution, the defendants have constructive custody of plaintiff. Plaintiff maintains that if the defendants ask that plaintiff be released, he will be released and that this amounts to constructive custody. A finding of constructive custody in this case effectively requires a finding that in this matter the Bolivian government is acting as a mere "puppet" of the United States. Whatever the U.S. presence in Bolivia, the Act of State doctrine, in the very least, requires this Court to recognize Bolivia as a separate sovereign with its own interests in prosecuting those who violate its laws within its territory. A Writ of Habeas purportedly directed to the defendants would have the effect of demanding that Bolivia deliver custody, thus inhibiting the investigation and prosecution of alleged crimes

within its borders. This Court will not issue such a writ.

III. INJUNCTIVE RELIEF: Plaintiff asks that this Court issue an injunction ordering the defendants to drop all charges against plaintiff and to request his release. We find that plaintiff is not entitled to such relief. [FN5]

To be entitled to a preliminary injunction, a plaintiff must establish four criteria: "(1) irreparable injury, (2) substantial likelihood of success on the merits, (3) a favorable balance of hardships, and (4) no adverse effect on the public interest." Black Fire Fighters Ass'n v. City of Dallas, 905 F.2d 63, 65 (5th Cir.1990). Assuming all facts alleged by plaintiff to be true, we nevertheless find that plaintiff cannot succeed on either the second or the fourth factor. Plaintiff seeks from this Court an injunction ordering defendants Baca and Elmore to withdraw their complaint against plaintiff in a Bolivian criminal prosecution and to request plaintiff's immediate release from Bolivian officials. If plaintiff were seeking such relief from a pending state criminal prosecution, we would be curbed from granting it by the Younger doctrine. See Alexander v. Ieyoub, 52 F.3d 554, 559 (5th Cir.1995) (citing Younger v. Harris, 401 U.S. 37 (1971)). We find that the Act of State Doctrine precludes us from doing so in this case. "Under the act of state doctrine our courts will not question the validity of the actions of foreign governments within their own borders." Airline Pilots Ass'n Int'l, AFL-CIO v. Taca Int'l Airlines, S.A., 748 F.2d 965, 969 (5th Cir.1984), cert. denied, 471 U.S. 1100 (1985). The doctrine's aim "is to avoid judicial interference with the role of the executive branch in international affairs." Id. Its use "averts potential diplomatic embarrassment from the courts of one sovereign sitting in judgment over the public acts of another." Id. at 970. In determining whether to apply the Act of State doctrine, we must consider the following factors: 1) the degree of involvement of the foreign state; 2) "the effect a judicial decision in a given case will have on our foreign relations;" and 3) "whether a decision in a given case will involve the adjudication of the laws, conduct or motivation of a foreign government." Id.. All of these factors are

overwhelmingly present in the case before us.

Plaintiff is asking this Court to stop two United States citizens living in a foreign country from cooperating with that country's on-going investigation of the plaintiff's alleged violation of its laws. In addition, plaintiff is petitioning this Court to order officers of the United States Embassy in Bolivia in their official capacities to direct their host country, Bolivia, to release the plaintiff, who was arrested by Bolivian authorities for violating Bolivian laws. At the time of this request, the plaintiff is being represented before the Bolivian court by Bolivian counsel who has secured his temporary release under a Bolivian habeas corpus proceeding. In summary, this court is being asked to intervene in, interfere with, and inhibit the prosecution of a United States citizen by a sovereign country--Bolivia--for an alleged violation of its laws, even though the United States citizen is being represented by Bolivian counsel before the Bolivian court. It is the opinion of this Court that it would be inappropriate and improper to attempt to take such action.

IV. CLAIMS FOR DAMAGES: The Government seeks to dismiss plaintiff's claims for damages on grounds of sovereign immunity. Plaintiff offers nothing to counter the Government's arguments, but rather, urges that this Court not address at this juncture his claims for damages--that we direct our attention only to the issuance of emergency relief. Yet, plaintiff seeks damages from the United States, a sovereign that must consent to be sued. Lack of such consent "is a fundamental, jurisdictional defect" and cannot be ignored. Charles A. Wright et al., 14 Federal Practice and Procedure S 3654 (2d ed. 1985); see Bank One, Texas, N.A. v. Taylor, 970 F.2d 16, 34 (5th Cir.1992), cert. denied, 113 S.Ct 2331 (1993).

A. Contract Disputes Act: Plaintiff's contract claims against the government are grounded on a "U.S. Department of State Contract with a U.S. Citizen or U.S. Resident for Personal Services," dated April 18, 1991, which we find to be an executive

agency contract for the procurement of services governed by the Contract Disputes Act of 1978, 41 U.S.C. S 601 et. seq. Although Congress has consented to suits on such contracts, it has granted the Court of Federal Claims exclusive jurisdiction to hear such claims. See Hayes v. United States Postal Service, 859 F.2d 354, 356-57 (5th Cir.1988); APA, Inc. v. Federal Sav. and Loan Ins. Corp., 562 F.Supp. 884, 886 (W.D.La.1983). District Courts do not have concurrent jurisdiction over such claims. APA, Inc., 562 F.Supp. at 887. Plaintiff's contract claims, therefore, are not within the jurisdiction of this Court.

B. Federal Tort Claims Act: In order to maintain a suit for money damages against the United States in tort (or its employees in their official capacity) a plaintiff must first give notice of his claim to the appropriate federal agency as prescribed in the Federal Tort Claims Act. 28 U.S.C. S 2675(a);> see Transco Leasing Corp. v. United States, 896 F.2d 1435, 1441 (5th Cir.), reh'g denied, > 905 F.2d 61 (5th Cir.1990). The Government contends, and plaintiff does not contest, that no such notice was filed. The giving of such notice is jurisdictional and cannot be waived. See Cook v. United States on behalf of U.S. Dep't of Labor, 978 F.2d 164, 166 (5th Cir.1992); Transco, 896 F.2d at 1441. Consequently, this Court has no jurisdiction to hear plaintiff's tort claims against the United States or the individual defendants in their official capacity.

C. CONSTITUTIONAL CLAIMS: We are left with plaintiffs claims against the United States and defendants Baca and Elmore in their official capacities for damages arising from alleged constitutional violations. Sovereign immunity deprives us of jurisdiction with regard to these claims as well. The United States has not waived sovereign immunity for suits seeking damages under the Constitution and thus, is immune from such damages as are the individual defendants in their official capacity. See Garcia v. United, 666 F.2d 960, 966 (5th Cir.), cert. denied, 459 U.S. 832 (1982); Sellers v. United States, 569 F.Supp. 1149, 1154 (N.D.Ga.1983). Thus, these claims also must be dismissed. In view of plaintiff's voluntary dismissal of claims against defendants

Baca and Elmore in their individual capacity, the government's motion is moot insofar as it addresses these claims.

For the foregoing reasons, IT IS HEREBY ORDERED THAT the Government's motion to dismiss is GRANTED as to each of plaintiff's remaining claims, namely those against the United States and those against defendants Baca and Elmore in their official capacities.

FN1. On plaintiff's motion, the preliminary injunction hearing has been continued until July 21, 1995.

FN2. The existence of the third mandamus factor, no other adequate remedy available, is also questionable here. Plaintiff has retained Bolivian counsel, who has been successful in obtaining plaintiff's release on a Bolivian writ of habeas corpus.

FN3. Arguments of "extraterritorial jurisdiction" stated in the affidavits of Mssrs. Zagaris and Blakesly are simply inapposite here. Even if plaintiff's alleged conduct constitutes a criminal violation of United States law touching the United States' interest in the "War on Drugs," the prosecutorial branch of our government is not seeking to prosecute it here--and it is not the province of this Court to reach out its jurisdictional arm sua sponte to embrace a foreign criminal prosecution. That the United States government could have prosecuted plaintiff's alleged crimes in a United States District Court does not translate into a clearly prescribed duty of defendants Baca and Elmore not to file charges with the Bolivian government.

FN4. To give rise to a duty of inquiry, the imprisonment first must be determined to be "unjust." To justify a demand of release, the imprisonment must be determined to be "wrongful." If the release is "unreasonably delayed," the President may use such force "as he may think necessary."

FN5. We asked the parties to brief this Court as to possible waiver

of sovereign immunity under Sheehan v. Army and Air Force Exch. Serv., 619 F.2d 1132, 1141 (5th Cir.1980) and Carter v. Seamans, 411 F.2d 767 (5th Cir.1969), cert. denied, > 397 U.S. 941 (1970) with respect to plaintiff's claims for non-monetary relief. We need not decide this issue now because we find that even if sovereign immunity had been waived with respect to these claims, plaintiff would not be entitled to a preliminary injunction.

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22 CFR 71.10 Emergency medical assistance.

(a) Eligibility criteria. A U.S. national incarcerated abroad is considered eligible to receive funded medical treatment under the following general criteria:

(1) Adequate treatment cannot or will not be provided by prison authorities or the host government;

(2) All reasonable attempts to obtain private resources (prisoner's family, friends, etc.) have failed, or such resources do not exist;

(3) There are medical indications that the emergency medical assistance is necessary to prevent, or attempt to prevent, the death of the prisoners, or failure to provide the serviced will cause permanent disablement.

(b) Services covered. Funds, once approved, may be expended for:

(1) Medical examination, when required;

(2) Emergency treatment;

(3) Non-elective surgery;

(4) Medications and related medical supplies and equipment required on a routine basis to sustain life;

(5) Preventive or protective medications and medical supplies and equipment (vaccinations, inoculations, etc.) required to combat epidemic conditions (general or intramural);

(6) Childbirth attendance, including necessary medical care of newborn children; and

(7) Within the consular district, transportation for the U.S. national and attendant(s) designated by incarcerating officials between the place of incarceration and the place(s) of treatment.

(c) Consular responsibility. As soon as the consular officer is aware that a U.S. national prisoner in the consular district faces a medical crisis, the
officer should take the following actions, setting forth the order or priority based on an evaluation of the facts received:

(1) Make every effort to contact the ill or injured prisoner as soon as possible;

(2) Take steps to obtain a professional medical diagnosis and prognosis of the ill or injured prisoner;

(3) Determine as accurately as possible the estimated costs of

recommended treatment or surgery;

(4) Obtain the names and addresses of family or friends who might serve as a source of private funds for medical services, and attempt to obtain the necessary funds;

(5) Request the prisoner to execute a promissory note, since funds expended by the Department to cover medical services normally are on a reimbursable basis; and

(6) Submit the above information, along with recommendations and evaluations, to the Department for approval and authorization.

(d) Emergency expenditure authorization. When a medical emergency prohibits the delay inherent in contacting the Department and receiving authority to expend funds, the consular officer can expend up to an amount to be established by the Department without prior Departmental approval if:

(1) Symptoms determine eligibility for emergency medical treatment; or

(2) An immediate medical examination is warranted in order to verify the alleged abuse of a U.S. national prisoner by arresting or confining authorities; or

(3) Immediate emergency medical treatment or surgery is necessary to prevent death or permanent disablement, and there is insufficient time to explore private funds or obtain Department approval; and

(4) A promissory note already has been executed by the prisoner, or if the circumstances warrant, by the consular officer without recourse.